



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 26, 1998

Ms. Sandra Joseph  
Open Records/Disclosure Officer  
Comptroller of Public Accounts  
State of Texas  
Austin, Texas 78774-0100

OR98-1299

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115618.

The Comptroller of Public Accounts (the "comptroller") received a request for all bids from vendors for Request for Proposal number 304-8-1707TOR except for Amdahl Corporation's bid. You claim that some of the requested information submitted in the bids of Hitachi Data Systems, International Business Machines, and EMC Corporation ("EMC") is protected by section 552.104. You also assert that some of the bid information submitted by EMC may be confidential proprietary information under section 552.110 of the Government Code.<sup>1</sup> We have considered the arguments you have raised and have reviewed the documents at issue. You have marked the information you seek to withhold.

Section 552.104 of the Government Code states:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

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<sup>1</sup>You have informed this office that neither Hitachi Data Systems or International Business Machines seeks to protect its bid information as confidential proprietary information. You state that the comptroller does not raise section 552.110 for these companies' information. Gov't Code § 552.301(a); Gov't Code § 552.305. This ruling, therefore, does not address the propriety of the release of these companies' bid information.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 (1990) at 4, 520 (1989) at 4. A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 (1987) at 2.

In this instance, you explain that the proposal at issue was bid in three parts. The comptroller sought bids "(1) to purchase a configuration with capacity from 762 GB to 840 GB of RAID DASD, (2) to obtain an option to purchase a second configuration with capacity from 762 GB to 840 GB of RAID DASD within 90 days from the date of the original offer, and (3) to obtain an offer to replace all existing non-RAID DASD with a like number of GBs of RAID DASD." You state that the first part of the request has been awarded. Open Records Decision Nos. 541 (1990) at 5 (section 552.104 generally does not except bids after bidding is completed and the contract has been awarded), 514 (1988) at 2, 319 (1982) at 3. You explain, however, that "[t]he second and third parts of the procurement have not been awarded. Any of the four bidders may ultimately be awarded the second and/or third parts of the contract. No decision has been made as to which bidder will be awarded the second and/or third parts." Thus, you argue that a competitive situation remains as to the second and third parts of the request for proposal. You have marked the information that you argue would give advantage to competitor or bidder. After reviewing your arguments and the submitted material, we find that you have shown the applicability of section 552.104 for the second and third parts of the request for proposal. You may withhold the information you have marked under section 552.104.

You also question whether you may release certain other marked portions of the bid submitted by EMC. You explain that this information may be confidential proprietary information. You take no position and make no arguments under section 552.110. Gov't Code § 552.305. Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified EMC about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). This office has received no response to our notification.

Because EMC did not respond to our notice, we have no basis to conclude that this company's information is excepted from disclosure. *See* Open Records Decision Nos. 639

(1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. Consequently, you may not withhold any of the information submitted by EMC under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID# 115618

Enclosures: Submitted documents

cc: Mr. Rick Wallace  
Amdahl Corporation  
816 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(w/o enclosures)

Mr. Michael T. McGuire  
District Manager  
EMC Corporation  
12720 Hillcrest Road, Suite 802  
Dallas, Texas 75230  
(w/o enclosures)

Mr. Erik Kwiecienski  
Storage Systems Marketing  
IBM Corporation  
301 Congress Avenue  
Austin, Texas 78701  
(w/o enclosures)

Mr. William Montgomery  
Hitachi Data Systems Corporation  
1717 West 6<sup>th</sup> Street, Suite 420  
Austin, Texas 78703  
(w/o enclosures)